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HAROLD B. WILLEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1954

No. 2

HARRY BRIGGS, JR., ET AL., APPELLANTS,

versus

R. W. ELLIOTT, CHAIRMAN, J. D. CARSON, ET AL., MEMBERS OF BOARD OF TRUSTEES OF SCHOOL DISTRICT NO. 22, CLARENDON COUNTY, S. C., ET AL., APPELLEES.

BRIEF FOR APPELLEES ON REARGUMENT ON QUESTIONS 4 AND 5

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November 15, 1954.

The R. L. Bryan Company, Legal Printers, Columbia, S. C.

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STATEMENT

The instant action was brought to enjoin the enforcement of provisions in the Constitution and statutes of the State of South Carolina which require separate schools for the white and colored races. The principal defendants were the school trustees of School District No. 22 of Clarendon County. (R. 2.)

The District Court of three judges (one judge dissenting) upheld the validity of the State's constitutional and statutory provisions under challenge, but found inequality in the school facilities furnished the two classes of school

children, and exercised its discretion to permit the school authorities to equalize such facilities. (R. 176 *et seq.*; 301 *et seq.*)

Under the South Carolina educational legislation of 1951, School District No. 22 was consolidated with a number of other school districts in Clarendon County into new School District No. 1, the school trustees of which were made parties to this action (R. 305, 306). By means of State aid for capital construction obtained by the new school district under the 1951 legislation, the school trustees have brought about equality of physical facilities and all other "tangible" factors.

In this Court's opinion filed May 17, 1954, it was held that, despite such equality, segregation in public education is a denial of the equal protection of the laws. Reargument was ordered on Questions 4 and 5 previously propounded by the Court, which questions relate to the formulation of the decrees to be entered by the Court in the five cases heard together.

The appellees discussed these questions in their brief on re-argument filed prior to the December, 1953, hearing (pp. 80-89), and reiterate the position there taken, that the only proper disposition of the appeal in the instant action is to remand the action to the court of first instance for further proceedings in conformity with the opinion of May 17, 1954. The District Court in the exercise of its equity powers, may then enter such decree as it may determine, under the evidence received by it upon further inquiry and under the principles which apply to the granting of equitable relief, to be proper.

ARGUMENT

In ordering re-argument on the question of relief, the Court stated that problems of considerable complexity are presented in the formulation of the decrees because the cases are class actions, because the wide applicability of the decision, and "because of the great variety of local conditions."

While the complaint (R. 5) alleges that the action was brought by the appellants as plaintiffs "in their own behalf and in behalf of all other Negro children attending the public schools in the State of South Carolina" (R. 5), the only appellees who have the function of actually providing, maintaining and operating public schools are the school trustees and superintendent of the district, whose jurisdiction is limited to the schools of School District No. 1. The functions of the other appellees are merely supervisory or appellate, and none of them have any jurisdiction or authority outside of Clarendon County.

It is apparent, therefore, that, while the decision itself will have effect as *stare decisis* in many States and school districts, the decree entered in the instant action will as a practical matter be effective only in School District No. 1, and is little, if any, affected by the fact that the action is a class action.

It is quite clear from the record, however, that the situation in School District No. 1 represents one extreme of "the great variety of local conditions" falling under the Court's decision. The district is in a predominantly rural and agricultural section, sparsely settled. Less than 10% of its school population is white (R. 265). Both its white and Negro schools are centralized, with reliance to an unusual degree upon school bus transportation (presently operated on a dual system basis). The problem in this district is not the assignment of a comparatively small num-

ber of Negro pupils to white schools. Here integration would involve the assignment of white pupils, in the proportion of less than one out of ten, to what are in reality Negro schools, and the transportation of many of such white pupils in what are essentially Negro school buses, all in abrupt and violent departure from and rupture of the pattern of community ways and habits of nearly a century. There is evidence in the record as to the difficulty to be expected in relation to public acceptance of desegregation in the schools of the district (R. 113, 114).

It is impossible to conceive of a problem arising under the Court's decision which is more difficult than that facing the school authorities in a district such as the one involved in the instant action, or a situation which is more in need of inquiry by the Court with a view of seeing that the public interest in the continuance of efficient public school education in the district as well as the private rights of the appellants are both duly considered in the framing of the final decree in the act' n.

As to Question 4—The Equity Powers of the Court.

In Question 4 the Court asked whether a decree necessarily follows (under the decision rendered) that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to "schools of their choice," or whether the Court, in the exercise of its equity powers, may permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions.

The appellees in their brief filed on re-argument in December, 1953 (pp. 80-82) took the position that under the equity powers vested in this Court (and in the lower federal courts as well) power is not lacking to permit such effective gradual adjustments, especially since the public

interest is so vitally involved. The public interest is a significant factor to be weighed by courts of equity in the granting or withholding of relief, *Virginia Ry. v. System Federation No. 40*, 300 U. S. 515, 552 (1937); *United States v. Morgan*, 307 U. S. 183, 194 (1939), and plaintiffs have on occasions been denied equitable relief altogether and remitted to less effectual remedies at law where the public interest might have been adversely affected, *Harrisonville v. W. S. Dickey Clay Mfg. Co.*, 289 U. S. 334 (1933); *Beasley v. Texas & Pacific Ry.*, 191 U. S. 492 (1903).

Indeed, the existence of the power of the Court referred to in Question 4(b) does not appear to be doubted by any interested party to the cases under consideration, and both Attorney General McGranery and Attorney General Brownell, in the briefs which they have heretofore filed in these cases, have strongly asserted and supported with argument and authority both the Court's power and the importance of its use in proper cases in whatever decrees are framed under the Court's decision, whether by this Court or by the District Courts.

In Attorney General McGranery's brief filed for the United States as *amicus curiae* prior to the December, 1952, hearing, and prior to the propounding by the Court of Questions 4 and 5, it was stated (p. 27):

> "It is fundamental that a court of equity has full power to fashion a remedy to meet the needs of the particular situation before it (citing cases). **The fact that a system or practice is determined to be unlawful does not of itself require the court to order that it be abandoned forthwith.**" (Emphasis added.)

It was further stated (pp. 28-29):

> "If, in any of the present cases, the Court should hold that to compel colored children to attend 'separate but equal' public schools is unconstitutional, the Government would suggest that in shaping the relief the Court should take into account the need, not only for

prompt vindication of the constitutional rights violated, but also for orderly and reasonable solution of the vexing problems which may arise in eliminating such segregation. **The public interest plainly would be served by avoidance of needless dislocation and confusion in the administration of the school systems affected.** It must be recognized that racial segregation in public schools has been in effect in many states for a long time. Its roots go deep in the history and traditions of these states. **The practical difficulties which may be met in making progressive adjustment to a non-segregated system cannot be ignored or minimized.**

"A decision that the Constitution forbids the maintenance of 'separate but equal' public schools will necessarily result in invalidation of provisions of constitutions, statutes, and administrative regulations in many states—provisions which were adopted in good faith upon the assumption, supported by previous declarations of this Court, that they were consistent with the requirements of the Fourteenth Amendment." (Emphasis added.)

Attorney General McGranery envisioned procedure that would "afford opportunity to responsible school authorities to develop a program most suited to their own conditions and needs" (p. 30), and it was suggested that "to the extent that there may exist popular opposition in some sections to abolition of racially-segregated school systems * * * a program for orderly and progressive transition would tend to lessen such antagonism." (p. 30.)

In Attorney General Brownell's brief filed prior to the December, 1953, hearing, Question 4 is discussed at length. The following indicate the Attorney General's conclusions as to the equity powers of the Court relevant here:

"The shaping of relief in the present cases involves reference to three fundamental principles governing the granting of judicial remedies, each of which is to some degree applicable here: (1) One whose legal

rights have been and continue to be violated is entitled to relief which will be effective to redress the wrong. If a court finds that certain conduct is unlawful, it normally enters a decree enjoining the continuation of such conduct. (2) A court of equity is not inflexibly bound to direct any particular form of relief. It has full power to fashion a remedy which will best serve the ends of justice in the particular circumstances. (3) In framing its judgment a court must take into account not only the rights of the parties but the public interest as well. The needs of the public, and the effect of proposed decrees on the general welfare, are always of relevant, if not paramount, concern to a court of justice." (pp. 153-154.)

"* * * [W]hatever the difficulties of determining what remedy would be most effective and fair in redressing the violation of constitutional right presented in these cases, we believe there can be no doubt of the Court's power to grant such remedy as it finds to be most consonant with the interests of justice." (p. 154.)

"Congress has expressly empowered the Court, in dealing with cases coming before it, to enter such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances. 28 U. S. C. 2106. The breadth of this power, and the flexibility of judicial remedies which it permits the Court to utilize, have been demonstrated in a great variety of situations (citing cases). * * * Where public interests are involved, equitable powers 'assume an even broader and more flexible character than when only a private controversy is at stake.'" pp. 154-156.)

"The Court has expressed a reluctance to enter decrees which would involve the judiciary in the administration of complex and detailed matters: "The judiciary is unsuited to affairs of business management; and control through the power of contempt is crude and clumsy and lacking in the flexibility necessary to make continuous and detailed supervision effective" (citing cases). The choice whether or not the

courts are to be thrust into a system involving difficult policing problems 'should not be faced unless the need for the system is great and the benefits plain.' " (p. 163.)

The Attorney General also considered and refuted the argument that the "personal and present" character of the right asserted by the appellants limits or makes inoperative the power of the Court to exercise its discretion and take the public interest into account in relation to the equitable relief which it may grant. He stated:

"It may be contended, however, that the powers of a court of equity are not so comprehensive where vindication of the constitutional right to equal protection of the laws is involved. Such right, the Court has pointedly observed, is personal and present (citing cases). * * * [T]he constitutional issues presented to the Court transcend the particular cases and complainants at bar, and in shaping its decrees the Court may take into account such public considerations as the administrative obstacles involved in making a general transition throughout the country from existing segregated school systems to ones not based on color distinctions. If the Court should hold in these cases that racial segregation *per se* violates the Constitution, the immediate consequence would be to invalidate the laws of many states which have been based on the contrary assumption. Racial segregation in public schools is not an isolated phenomenon limited to the areas involved in the cases at bar, and it would be reasonable and in accord with its historic practices for the Court in fashioning the relief in these cases to consider the broad implications and consequences of its ruling.

"The 'personal and present' language appears in cases involving education on the professional and graduate levels. Each case involved a single plaintiff. It is one thing to direct immediate relief where a single individual seeks vindication of his constitutional rghts in the relatively narrow area of professional and grad-

uate school education, and an entirely different matter to follow the same course in the broad area of public school education affecting thousands of children, teachers, and schools. **We do not think that when the Court in those cases characterized the right to equal protection of the laws as 'personal and present', it was thereby rejecting the applicability, to cases involving the right, of settled principles governing equitable relief.** (Emphasis added.) On the contrary, the Court has recognized that such principles are equally applicable to litigation involving fundamental constitutional rights of individuals." (pp. 164-167.)

"* * * [T]he Court has undoubted power in these cases to enter such decrees as it determines will be most effective and just in relation to the interests, private and public, affected by its decision." (p. 167.)

The appellants, in their brief on re-argument filed prior to the December, 1953, hearing, conceded "that, as a court of chancery, this Court has power in a proper case to mold its relief to individual circumstances" (p. 191), but contended that the "personal and present" nature of the appellants' respective rights made such power inapplicable in these cases, a contention conclusively answered in Attorney General Brownell's brief, as has been shown.

The appellees respectfully submit that this Court, in the exercise of its equity powers, may permit effective gradual adjustments to be brought about from existing segregated systems to systems not based on color distinctions, and that the equitable discretion of this Court (and of the lower federal courts) should be exercised in a situation such as that presented here in such manner, after due inquiry into all relevant factors, as may best subserve the public interest as well as the private interests involved.

As to question 5—Should this Court Formulate the Decrees?

Question 5, predicated upon the assumption that the Court will exercise its equity powers in the manner contemplated in Question 4(b), asked whether this Court should formulate detailed decrees in the cases itself, or should remand them to the courts of first instance with directions to frame the decrees.

As to the first alternative, the Court asked what specific issues the decrees should reach, and whether the Court should appoint a special master to hear evidence and recommend specific terms of such decrees.

As to the second alternative, the Court asked what general directions to the courts of first instance should be included in its remand, and also what procedures the courts of first instance should follow in arriving at the specific terms of more detailed decrees.

The appellees in their brief filed on re-argument prior to the December, 1953, hearing (pp. 83-89) took the position that this Court should not, and indeed could not, formulate a detailed decree in this case; that this Court should not appoint a special master to hear evidence with a view of recommending specific terms for such a decree; and that this Court should remand the case to the District Court for further proceedings in conformity with the Court's opinion.

Attorney General McGranery, in his brief above referred to, considered the district court to be an appropriate tribunal to "fashion particular orders to meet particular needs" (p. 30), and "assumed that the district courts are, because of their familiarity with local conditions, the appropriate tribunals to deal with issues of relief" (p. 31, n. 18). In the same footnote (seemingly as an afterthought) it was observed that the Court may wish to formulate more precise standards and provisions for the guidance of the

district courts, in which event, among other things, the suggestion was made that a special master might be appointed to hold hearings and make recommendations to the Court on that question.

In discussing Question 5, Attorney General Brownell referred briefly to "some of the kinds of administrative problems which may arise in giving effect to a holding that separate school systems are unconstitutional." These included: (a) that such a decision "will necessarily result in invalidation of provisions of constitutions, statutes, and administrative regulations in many states"; (b) that in many areas existing boundaries of school districts may require extensive revision; (c) that school authorities may wish to give pupils a choice of attending one of several schools, a choice now prohibited; (d) that schools may have to be consolidated, teachers and pupils transferred, teaching schedules revised, and transportation arrangements altered; and (e) that in some jurisdictions (including South Carolina) changes in the law (as for instance on the allocation of public school funds) may be required.

He expressed the view that (p. 171):

> "The extent of the administrative and legal changes required will thus vary in the different jurisdictions involved, depending on these and other factors which now cannot be evaluated or measured. Accordingly, **it is impossible to determine at this time what specific period of time would be required to overcome the administrative obstacles to school integration in any particular area.**" (Emphasis added.)

Attorney General Brownell referred in some detail to New Jersey as an example of recent experience in desegregation under a state constitutional amendment. He stated (pp. 175-176):

> "Following the adoption in 1947 of a state constitution expressly forbidding racial segregation in the

public schools of the state, a program for elimination of segregated schools was put into operation. **A survey disclosed that there were 43 school districts in New Jersey which had one or more separate Negro schools.** These were located in urban areas, agricultural townships, and in some relatively well-to-do suburban communities. **Practically all the school officials and a majority of the school board members concerned did not oppose the program of racial integration of pupils.**

"Since many of the communities involved had individual problems, no single formula could be applied."

And further (p. 178):

"**By September 1951, 40 of the 43 school districts involved in the New Jersey program were completely integrated and the remaining three districts had taken substantial steps towards integration.** The state official in charge of the program summarized the New Jersey experience as follows: '**While New Jersey cannot furnish any one formula,** it can testify that complete integration in the public schools can and will work. It may even be safe to say once more, that the way to learn to do a thing is to do it, and in this respect, New Jersey has proven again that the best way to integrate is to do it.'" (Emphasis added.)

After detailed consideration of the situation which would arise in the event of a decision holding separate school systems to be unconstitutional, Attorney General Brownell stated (p. 183):

"Administrative and other obstacles will have to be overcome in order to accomplish complete transition to nonsegregated systems. **The nature and extent of such problems will vary throughout the country, and the time required to eliminating school segregation in any particular community will depend on numerous factors which neither this Court nor counsel can now evaluate.**" (Emphasis added.)

And further (p. 184):

> **"There is no single formula or blueprint which can be uniformly applied in all areas where existing school segregation must be ended. Local conditions vary, and what would be effective and practicable in the District of Columbia, for example, could be inappropriate in Clarendon County, South Carolina. Only a pragmatic approach based on a knowledge of local conditions and problems can determine what is best in a particular place. For this reason, the court of first instance in such area should be charged with the responsibility for supervision of a program for carrying out the Court's decision. This Court should not, either itself or through appointment of a special master, undertake to formulate specific and detailed programs of implementation adapted to the special needs of particular cases."** (Emphasis added.)

Stating that the local school authorities should have the burden of presenting and establishing the local considerations to the District Court, he observed (p. 185):

> "As the responsible authorities in charge of the public schools, they would be in the best position to develop a program most suited to local conditions and needs, and to indicate the length of time required to put it into effect. In passing upon such a program, the lower court could receive the views not only of the parties but of interested persons and groups in the community. Such a locally-developed program for orderly and progressive transition to nonsegregation would tend to encounter less resistance and be thus more likely to achieve success."

Attorney General Brownell suggested a form of remand adapted from that employed by this Court in *United States v. American Tobacco Co.*, 221 U. S. 106, but the appellees respectfully submit that remand of the instant action to the lower court for further proceedings in conformity with the Court's opinion (as is done in the ordi-

nary lawsuit) will serve every purpose of the suggested decree, and will avoid the introduction of arbitrary time limitations and conditions upon the power of the District Court in dealing with the case.

The appellants in their brief on re-argument filed prior to the December, 1953, hearing (p. 196, n. 447) observed that "taking of evidence by a Master" (appointed by this Court) "is undoubtedly a departure from normal practice on appeal." The appellees have suggested that, this being an appellate case, there is grave doubt whether under "the established chancery practice" this Court may receive new evidence and appoint a Master for that purpose, *Russell v. Southard*, 12 How. 139, 159 (1851), and also that under settled principles the "framing of decrees should take place in the District Court rather than in Appellate Courts," *International Salt Co. v. United States*, 332 U. S. 392 (1947).

The appellants also adverted to the fact that "even in the five cases joined for hearing, there appears to be no uniformity in the extent of the task of adjustment from segregated to non-segregated schools" (p. 195). Despite this they stated that they were unable, in good faith, to suggest terms for a decree contemplating gradual adjustment, observing that it would be customary procedure for those wishing postponement of relief to produce reasons therefor, whereupon they would be in a position to offer their views. The appellees, as above shown, contend that such procedure should be had in the District Court, and not this Court, and the briefs of both Attorneys General, above referred to, support this view (p. 197).

It is of interest to note the observations of counsel for the appellants in oral argument on December 9, 1952, on the question of the relief sought and deemed appropriate

by them in the instant action. He stated (Tr. of Oral Argument, December 9, 1952, pp. 23-24):

"So what do we have in the record? We have testimony of physical inequality. It is admitted. We have the testimony of experts as to the exact harm which is inherent in segregation wherever it occurs. That I would assume is too broad for the immediate decision, because after all, the only point before this Court is the statute as it was applied in Clarendon County. But if this Court would reverse and the case would be sent back, we are not asking for affirmative relief. That will not put anybody in any school. The only thing that we ask for is that the state-imposed racial segregation be taken off, and to leave the county school board, the county people, the district people, to work out their own solution of the problem to assign children on any reasonable basis they want to assign them on."

And further (p. 28):

"But I think the question as to what would happen if such decree was entered—I again point out that it is actually a matter that is for the school authorities to decide, and it is not a matter for us, it seems to me, as lawyers, to recommend except where there is racial discrimination or discrimination on one side or the other.

"But my emphasis is that all we are asking for is to take off this state-imposed segregation. It is the state-imposed part of it that affects the individual children. And the testimony in many instances is along that line."

And further (p. 29):

"It would be my position in a case like that, which is very much in answer to the brief filed by the United States in this case—it would be my position that the important thing is to get the principle established, and if a decree were entered saying that facilities are declared to be unequal and that the appellants are entitled to an injunction, and then the District Court issues the injunction, it would seem to me that it would

go without saying that the local school board had the time to do it. But obviously it could not do it overnight, and it might take six months to do it in one place and two months to do it in another place.

"Again, I say it is not a matter for judicial determination. That would be a matter for legislative determination."

We respectfully submit that, certainly in the instant case, the appropriate action to be taken by this Court is to remand the case to the District Court for the formulation of the decree by that Court.

As to what general directions this Court should give to the District Court in relation thereto, we think that there need be and should be none. The equity powers vested in the lower federal courts are ample to enable them to determine what decrees should be entered in reference to particular situations in the light of evidence taken to show what will best subserve the public and private interests involved. The lower courts are clearly in a better position to inquire into local conditions affecting the exercise of such powers than is this Court.

The courts of first instance can and should receive evidence on local conditions and the factors to be taken into account in determining the proper decrees to be entered in each situation; and they should hold hearings thereon after remand so that the parties can adduce such evidence. It is not believed by the appellees that any other procedure need be taken by such courts in connection with the formulation of their decrees.

CONCLUSION

The effective solution of the problems which arise under the Court's decision (to the extent that they are capable of solution) lies fundamentally in the legislative and administrative fields of governmental responsibility. The Court in its decision has declared the constitutional principle henceforth applicable to separate school systems in the public schools. This having been done, a decent respect for the sovereignty of the States affected, and a proper regard for the division of functions and responsibilities inherent in our system of government, warrants the judiciary in assuming that the legislative and administrative branches of the State governments are capable of undertaking the solution of the problems confronting them under the Fourteenth Amendment as now construed by the Court, and should have the opportunity of so doing.

The judicial process is not adapted to the handling of such matters. The Courts cannot compel the enactment of legislation or the adoption of administrative regulations; they cannot compel the levy of taxes or the making of appropriations. The Courts act negatively in the decrees which they enter in such cases. They may annul, but they cannot create; they may prohibit, but they cannot devise affirmative solutions and command their adoption.

There are those who would like to see the Court invade the legislative and administrative fields by devising "criteria of desegregation" to be included in its decrees in the pending cases, as conditions for the exercise of the equitable discretion of the lower courts, and hence in reality conditions for the exercise of the legislative and executive powers of the State governments. The theory is that thereby the Court would in effect make its present decisions applicable in detail and in advance to every State and school district in the Nation in which separate schools have

been maintained, and thus speed up the "integration" program.

The obvious difficulty with this theory is that such action by the Court would be indistinguishable in quality and purpose from legislative or administrative action, an attempt to shape and compel legislative and administrative action in derogation of legislative and administrative discretion and choice. Judicial power, in the words of the Court in *Muskrat v. United States*, 219 U. S. 346 (1911), is "the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction." It may be that the Congress could take some such action under the enforcement section of the Fourteenth Amendment, but affirmative action of that character is not consistent with the nature of the judicial power vested in the United States courts, nor is it consistent with such power to prejudge in such manner the great variety of local conditions and situations arising under the decision.

In opposing the exercise by the courts of their equitable discretion to permit effective and orderly gradual adjustment, the appellants have stressed the "personal and persent" nature of their respective rights, and contend that they should be accorded such rights without any delay. In this connection, however, the New Jersey experience with such adjustments cannot be ignored.

In New Jersey, as has been shown, with every factor favorable to such adjustments, the State constitutional change occurred in 1947. By September, 1951, there were still 3 school districts which had not accomplished adjustment, although they had taken substantial steps thereto, and because of the individual problems of many of the communities involved it proved impossible to devise and employ "any one formula." New Jersey is cited as an ex-

ample of successful adjustment, and yet there the program was not yet complete some four years after separate schools had been prohibited by the constitutional change there involved. The problems and difficulties facing the school authorities of this district greatly exceed those of any district in New Jersey, and are as great as any that will arise in any school district in the country.

In the instant case, legal segregation, or "state-imposed" segregation as the appellants call it, having been declared unconstitutional in the public schools, it seems fair to say that the appellants and others similarly situated will be deprived of little educational advantage by delay in integration of the pupils of the district, in view of the insignificant number of white pupils who would be re-assigned in the public school system of the district. We respectfully submit that the public interest requires that the instant case is a proper one to be remanded for further proceedings in the District Court, so that the school authorities will have the opportunity of presenting their problems fully to that tribunal, and of appealing to its equitable discretion in connection with their further handling of its affairs.

Respectfully submitted,

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November 15, 1954.